

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JEFFREY L. JARRED**

Claimant

VS.

**SWIFT TRANSPORTATION COMPANY, INC.**

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA**

Insurance Carrier

Docket No. 1,016,130

## ORDER

Respondent appeals the August 5, 2004 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was awarded temporary total disability compensation beginning February 26, 2004, through June 1, 2004. Additionally, respondent was ordered to pay all related medical expenses as authorized medical treatment, including medical mileage and prescription reimbursement.

## ISSUES

Respondent contends that claimant has failed to prove that he suffered personal injury by accident arising out of and in the course of his employment. Claimant, on the other hand, contends that the Appeals Board (Board) does not have jurisdiction to consider this matter, as this identical issue was raised to the Administrative Law Judge (ALJ) and to the Board at an earlier date, with the Board finding in claimant's favor on appeal from the April 29, 2004 preliminary hearing Order. The Board, in its June 29, 2004 Order, affirmed the ALJ's determination that claimant's injury, which occurred on a cigarette break, fell within the personal comfort doctrine and the injury was, therefore, compensable.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented, the Board finds the Order of the ALJ should be affirmed.

Claimant was employed as a truck driver for respondent, suffering accidental injury on February 21, 2004. The evidence describing the injury is somewhat in dispute, as claimant contends he pulled his truck over to the side of the road to repair a damaged mud flap. While getting back into the truck, claimant testified he stepped on a small patch of ice and slipped, hitting his left leg against the truck's running board. Respondent, however, contended that claimant suffered the injury after dropping a burning ash into his sock and injuring himself while trying to put out the fire. Respondent contended this was a personal risk, rather than an injury arising out of and in the course of employment.

The Board, in its June 29, 2004 decision, analyzed the personal comfort doctrine, finding a cigarette break to be analogous to a coffee break. When accidental injuries occur while an employee is ministering to a personal comfort, such as smoking a cigar in this case, this does not constitute a departure from the employment relationship, and the injury is, therefore, compensable.<sup>1</sup>

The matter was remanded to the ALJ for further orders consistent with the Board's determination. The matter was brought before the ALJ on August 5, 2004. At that time, respondent provided no additional information regarding the circumstances surrounding the injury. Respondent's attorney did make a comment during his opening statement:

[T]he respondent renews its vigorous objection to this being found to be a compensable injury, believing that this is a personal injury by accident that did not arise out of and in the course of employment, and the Board was in error when it read the transcript to find that claimant had not abandoned his position when he had this injury involving a burn on his leg as a result of smoking a celebratory cigar.<sup>2</sup>

The ALJ then proceeded to award the benefits above described.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues, which are deemed jurisdictional:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?

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<sup>1</sup> *Wallace v. Sitel of North America*, No. 242,034, 1996 WL 1008023 (Kan. WCAB Oct. 28, 1999).

<sup>2</sup> P.H. Trans. (Aug. 5, 2004) at 5.

- (3) Did the worker provide both timely notice and written claim of the accidental injury?
- (4) Is there any defense that goes to the compensability of the claim?<sup>3</sup>

Additionally, the Board may review those preliminary hearing orders where a judge has exceeded his or her jurisdiction or authority in awarding the benefits requested.<sup>4</sup>

The Board acknowledges whether a claimant suffered accidental injury arising out of and in the course of employment is an issue over which it does take jurisdiction from a preliminary hearing appeal. The Board has also ruled many times in the past that, as provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.<sup>5</sup>

However, it is not judicially expedient for a party to revisit the same issue at numerous preliminary hearings while providing absolutely no additional evidence in support of that party's position. The Board welcomes the opportunity to revisit issues when a party believes it has been aggrieved by an earlier decision. However, to revisit the same issue repeatedly, while providing no additional support, is a waste of time for the parties, the ALJ and the Board. In this instance, the Board does not modify its earlier determination that claimant's injury falls within the personal comfort doctrine, as was discussed in detail in the Board's earlier decision in this matter and in *Wallace*.<sup>6</sup> The Board, therefore, finds that claimant has proven that he suffered accidental injury arising out of and in the course of his employment. Respondent is admonished that if it wishes to revisit this issue, additional evidence would be prudent.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated August 5, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>3</sup> K.S.A. 44-534a.

<sup>4</sup> K.S.A. 2003 Supp. 44-551.

<sup>5</sup> K.S.A. 44-534a(a)(2).

<sup>6</sup> *Wallace, supra*.

Dated this \_\_\_\_ day of October 2004.

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BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director